



4000-01-U

DEPARTMENT OF EDUCATION

34 CFR Part 36

RIN 1801-AA16

[Docket ID ED-2015-OGC-0051]

Adjustment of Civil Monetary Penalties for Inflation

AGENCY: Department of Education.

ACTION: Interim final regulations.

SUMMARY: The Department of Education (Department) issues these interim final regulations to adjust the Department's civil monetary penalties (CMPs) for inflation, as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act).

DATES: These regulations are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. In this rule, the adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the 2015 Amendments. Therefore, violations occurring on or before November 2, 2015, and assessments made prior to August 1, 2016 whose associated violations occurred after November 2, 2015, will continue to be

subject to the civil monetary penalty amounts set forth in the Department's existing regulations at 34 CFR 36.2 (or as set forth by statute if the amount has not yet been adjusted by regulation).

FOR FURTHER INFORMATION CONTACT: Levon Schlichter, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue, SW., room 6E235, Washington, DC 20202-2241. Telephone: (202) 453-6387 or by email: levon.schlichter@ed.gov.

If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the contact person listed in this section.

SUPPLEMENTARY INFORMATION:

Background:

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) (28 U.S.C. 2461 note) provides for the regular evaluation of civil monetary penalties (CMPs) to ensure that they continue to maintain their deterrent value. The Inflation Adjustment Act required that each agency issue regulations to adjust its

CMPs beginning in 1996 and at least every four years thereafter. The Department published its most recent cost adjustment to each CMP in the Federal Register on October 2, 2012 (77 FR 60047), and those adjustments became effective on the date of publication.

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) (section 701 of Pub. Law 114-74), which further amended the Inflation Adjustment Act, to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect.

The 2015 Act requires agencies to: (1) adjust the level of civil monetary penalties with an initial "catch-up" adjustment through an interim final rulemaking (IFR); and (2) make subsequent annual adjustments for inflation. Catch-up adjustments are based on the percent change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in the year the penalty was last adjusted by a statute other than the Inflation Adjustment Act, and the October 2015 CPI-U. Annual inflation adjustments are based on the percent change

between the October CPI-U preceding the date of each statutory adjustment, and the prior year's October CPI-U.¹

The Department is required to publish an IFR with the initial penalty adjustment amounts by July 1, 2016, and the new penalty levels must take effect no later than August 1, 2016. These adjustments will apply to all civil monetary penalties covered by the Inflation Adjustment Act.

A CMP is defined in the statute as any penalty, fine, or other sanction that is (1) for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; (2) assessed or enforced by an agency pursuant to Federal law; and (3) assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

The formula for the amount of a CMP inflation adjustment is prescribed by law, as explained in OMB Memorandum M-16-06 (February 24, 2016), and is not subject to the exercise of discretion by the Secretary of Education (Secretary). Under the 2015 Act, the Department must use, as the baseline for adjusting the CMPs in this IFR, the CMP amounts as they were most recently established or adjusted under a provision of law other than by the Inflation

¹ If a statute that created a penalty is amended to change the penalty amount, the Department does not adjust the penalty in the year following the adjustment.

Adjustment Act. In accordance with the 2015 Act, we are not using the amounts set out in 34 CFR part 36 in 2012 in the formula used to adjust for inflation because those CMP amounts were updated pursuant to the Inflation Adjustment Act.² Instead, the baselines we are using are the amounts set out most recently in each of the statutes that provide for civil penalties. Using these statutory CMPs, we have determined which year those amounts were originally enacted by Congress (or the year the statutory amounts were last amended by the statute that established the penalty) and used the annual inflation adjustment multiplier corresponding to that year from Table A of OMB Memorandum M-16-06. We then rounded the number to the nearest dollar and checked, as required by the Inflation Adjustment Act, to see if that adjusted amount exceeded 150 percent of the CMP amount that was established under 34 CFR part 36, and in effect on November 2, 2015. If any of the amounts exceeded 150 percent, we are required to use the lesser amount (the 150 percent amount). All of the adjusted amounts were less than 150 percent so we did not have to

²As originally enacted, the Inflation Adjustment Act limited the first increased adjustment, which we made through regulation, to a maximum of 10 percent. This 10 percent limitation affected the increase we last made in the 2012 rulemaking. In the 2015 Act, Congress determined that limiting the first adjustments to 10 percent reduced the effectiveness of the penalties, so the 2015 Act requires us to use the statutory amounts as our baseline.

replace any of the amounts we calculated using the multiplier from Table A of OMB Memorandum M-16-06 with the lesser amount.

The Department's Civil Monetary Penalties

The following analysis calculates new civil monetary penalties for penalty statutes in the order in which they appear in 34 CFR 36.2. The 2015 Act provides that any increase to an agency's CMPs applies only to CMPs, including those whose associated violation predated such increase, which are assessed after the effective date of the adjustments. These regulations are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Therefore, the adjustments made by this amendment to the Department's CMPs apply only to violations that are assessed after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Statute: 20 U.S.C. 1015(c)(5).

Current Regulations: The CMP for 20 U.S.C. 1015(c)(5) [Section 131(c)(5) of the Higher Education Act of 1965, as amended (HEA)], as last set out in statute in 1998 (Pub. Law 105-244, title I, §101(a), Oct. 7, 1998, 112 Stat. 1602), is a fine of up to \$25,000 for failure by an IHE to provide information on the cost of higher education to the Commissioner of Education Statistics.

New Regulations: The new penalty for this section is \$36,256.

Reason: Using the multiplier for 1998 of 1.45023 from OMB Memorandum M-16-06, the new penalty is calculated as follows: $\$25,000 \times 1.45023 = \$36,255.75$, which makes the adjusted penalty \$36,256, when rounded to the nearest dollar.

Statute: 20 U.S.C. 1022d(a)(3).

Current Regulations: The CMP for 20 U.S.C. 1022d(a)(3) [Section 205(a)(3) of the HEA], as last set out in statute in 2008 (Pub. Law 110-315, title II, §201(2), Aug. 14, 2008, 122 Stat. 3147), provides for a fine of up to \$27,500 for failure by an IHE to provide information to the State and the public regarding its teacher-preparation programs.

New Regulations: The new penalty for this section is \$30,200.

Reason: Using the multiplier for 2008 of 1.09819 from OMB Memorandum M-16-06, the new penalty is calculated as follows: $\$27,500 \times 1.09819 = \$30,200.23$, which makes the adjusted penalty \$30,200, when rounded to the nearest dollar.

Statute: 20 U.S.C. 1082(g).

Current Regulations: The CMP for 20 U.S.C. 1082(g) [Section 432(g) of the HEA], as last set out in statute in 1986 (Pub. Law 99-498, title IV, §402(a), Oct. 17, 1986, 100 Stat. 1401), provides for a fine of up to \$25,000 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program.

New Regulation: The new penalty for this section is \$53,907.

Reason: Using the multiplier for 1986 of 2.15628 from OMB Memorandum M-16-06, the new penalty is calculated as follows: $\$25,000 \times 2.15628 = \$53,907.00$, which makes the adjusted penalty \$53,907, when rounded to the nearest dollar.

Statute: 20 U.S.C. 1094(c)(3)(B).

Current Regulations: The CMP for 20 U.S.C. 1094(c)(3)(B) [Section 487(c)(3)(B) of the HEA], as set out in statute in 1986 (Pub. Law 99-498, title IV, §407(a), Oct. 17, 1986, 100 Stat. 1488), provides for a fine of up to \$25,000 for an IHE's violation of Title IV of the HEA or its implementing regulations. Title IV authorizes various programs of student financial assistance.

New Regulations: The new penalty for this section is \$53,907.

Reason: Using the multiplier for 1986 of 2.15628 from OMB Memorandum M-16-06, the new penalty is calculated as follows: $\$25,000 \times 2.15628 = \$53,907.00$, which makes the adjusted penalty \$53,907, when rounded to the nearest dollar.

Statute: 20 U.S.C. 1228c(c)(2)(E).

Current Regulations: The CMP for 20 U.S.C. 1228c(c)(2)(E) [Section 429 of the General Education Provisions Act], as set out in statute in 1994 (Pub. Law 103-382, title II, §238, Oct. 20, 1994, 108 Stat. 3918), provides for a fine of up to \$1,000 for an educational organization's failure to disclose certain information to minor students and their parents.

New Regulations: The new penalty for this section is \$1,591.

Reason: Using the multiplier for 1994 of 1.59089 from OMB Memorandum M-16-06, the new penalty is calculated as follows: $\$1,000 \times 1.59089 = \$1,590.89$, which makes the adjusted penalty \$1,591, when rounded to the nearest dollar.

Statute: 31 U.S.C. 1352(c)(1) and (c)(2)(A).

Current Regulations: The CMPs for 31 U.S.C. 1352(c)(1) and (c)(2)(A), as set out in statute in 1989, provide for a fine of \$10,000 to \$100,000 for recipients of

Government grants, contracts, etc. that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts.

New Regulations: The new penalties for these sections are \$18,936 to \$189,361.

Reason: Using the multiplier for 1989 of 1.89361 from OMB Memorandum M-16-06, the new minimum penalty is calculated as follows: $\$10,000 \times 1.89361 = \$18,936.10$, which makes the adjusted penalty \$18,936, when rounded to the nearest dollar. The new maximum penalty is calculated as follows: $\$100,000 \times 1.89361 = \$189,361.00$, which makes the adjusted penalty \$189,361, when rounded to the nearest dollar.

Statute: 31 U.S.C. 3802(a)(1) and (a)(2).

Current Regulations: The CMPs for 31 U.S.C. 3802(a)(1) and (a)(2), as set out in statute in 1986 (Pub. Law 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1937), provide for a fine of up to \$5,000 for false claims and statements made to the Government.

New Regulations: The new penalty for this section is \$10,781.

Reason: Using the multiplier for 1986 of 2.15628 from OMB Memorandum M-16-06, the new penalty is calculated as follows: $\$5,000 \times 2.15628 = \$10,781.40$, which makes the

adjusted penalty \$10,781, when rounded to the nearest dollar.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a significant regulatory action as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities in a material way (also referred to as "economically significant" regulations);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

Based on the number and amount of penalties imposed under the CMPs amended in this IFR, we have determined that this regulatory action will have none of the economic impacts described under the Executive order. This IFR is required by statute, the adjusted CMPs are not at the Secretary's discretion, and, accordingly, this IFR does not have any of the policy impacts described under the Executive order. Because this IFR is not a significant regulatory action, it is not subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or providing information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that

might result from technological innovation or anticipated behavioral changes.”

We are issuing this IFR as required by statute. The Secretary has no discretion to consider alternative approaches as delineated in the Executive order. Based on this analysis and the reasons stated in the preamble, the Department believes that this IFR is consistent with the principles in Executive Order 13563.

Waiver of Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice- and-comment rulemaking when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b) (B)). There is good cause to waive rulemaking here as unnecessary.

Rulemaking is “unnecessary” in those situations in which “the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.” Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001), quoting U.S. Department of Justice, Attorney

(1947) and South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983).

These regulations merely implement the statutory mandate to adjust CMPs for inflation. The regulations reflect administrative computations performed by the Department as prescribed by the statute and the Secretary has no discretion in determining the new penalties.

The APA also generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). Again, because these final regulations merely implement non-discretionary administrative computations, there is good cause to make them effective on the day they are published.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The formula for the amount of the inflation adjustments is prescribed by statute and is not subject to the Secretary's discretion. These CMPs are infrequently imposed by the Secretary, and the regulations do not involve any special considerations that might affect the imposition of CMPs on small entities.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

Based on our own review, we have determined that this IFR does not require transmission of information that any other agency or authority of the United States gathers or makes available.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the Federal Register, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the Federal Register by using the article search feature at: www.federalregister.gov. Specifically,

through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 36

Claims, Fraud, Penalties.

Dated: July 27, 2016.

John B. King, Jr.,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 36 of title 34 of the Code of Federal Regulations as follows:

PART 36--ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

1. The authority citation for part 36 is revised to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3 and 3474; 28 U.S.C. 2461 note, as amended by §701 of Pub. Law 114-74, unless otherwise noted.

2. In §36.1, revise the authority citation to read as follows:

§36.1 Purpose.

* * * * *

(Authority: 20 U.S.C. 1221e-3 and 3474; 28 U.S.C. 2461 note, as amended by §701 of Pub. Law 114-74.)

3. Section 36.2 is amended by revising Table I and the authority citation to read as follows:

§36.2 Penalty adjustment.

* * * * *

Table I, Section 36.2.--Civil Monetary Penalty Inflation Adjustments

Statute	Description	New maximum (and minimum, if applicable) penalty amount
20 U.S.C. 1015(c) (5) (Section 131(c) (5) of the Higher Education Act of 1965 (HEA))	Provides for a fine, as set by Congress in 1998, of up to \$25,000 for failure by an institute of higher education to provide information on the cost of higher education to the Commissioner of Education Statistics.	\$36,256
20 U.S.C. 1022d(a) (3) (Section 205(a) (3) of the HEA)	Provides for a fine, as set by Congress in 2008, of up to \$27,500 for failure by an IHE to provide information to the State and the public regarding its teacher- preparation programs.	\$30,200
20 U.S.C. 1082(g) (Section 432(g) of the HEA)	Provides for a civil penalty, as set by Congress in 1986, of up to \$25,000 for violations by lenders and guaranty agencies of Title IV of the HEA, which authorizes the Federal Family Education Loan Program.	\$53,907
20 U.S.C. 1094(c) (3) (B) (Section 487(c) (3) (B) of the HEA)	Provides for a civil penalty, as set by Congress in 1986, of up to \$25,000 for an IHE's violation of Title IV of the HEA, which authorizes	\$53,907

	various programs of student financial assistance.	
20 U.S.C. 1228c(c) (2) (E) (Section 429 of the General Education Provisions Act)	Provides for a civil penalty, as set by Congress in 1994, of up to \$1,000 for an educational organization's failure to disclose certain information to minor students and their parents.	\$1,591
31 U.S.C. 1352(c) (1) and (c) (2) (A)	Provides for a civil penalty, as set by Congress in 1989, of \$10,000 to \$100,000 for recipients of Government grants, contracts, etc. that improperly lobby Congress or the Executive Branch with respect to the award of Government grants and contracts.	\$18,936 to \$189,361
31 U.S.C. 3802(a) (1) and (a) (2)	Provides for a civil penalty, as set by Congress in 1986, of up to \$5,000 for false claims and statements made to the Government.	\$10,781

(Authority: 20 U.S.C. 1221e-3 and 3474; 28 U.S.C. 2461 note, as amended by §701 of Pub. Law 114-74).

[FR Doc. 2016-18179 Filed: 7/29/2016 8:45 am; Publication Date: 8/1/2016]